

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT BINGHAM
Claimant

VS.

K-MART CORPORATION
Respondent
Self-Insured

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Docket No. 255,819

ORDER

Claimant appeals the June 28, 2000, preliminary hearing Order of Administrative Law Judge Brad E. Avery. Claimant was denied benefits after the Administrative Law Judge found claimant had failed to prove notice within 10 days as required by K.S.A. 44-520 and further that claimant had not shown just cause for his failure to provide timely notice.

ISSUES

- (1) Did claimant provide timely notice of accident as required by K.S.A. 44-520 and, if not, was there just cause for his failure to provide this notice in a timely fashion?
- (2) In its brief, respondent raises the issue of whether claimant suffered accidental injury arising out of and in the course of his employment on the date alleged?

Those are the only issues for the Board's consideration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, and for preliminary hearing purposes, the Appeals Board finds that Order of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury through a series of accidents ending March 30, 2000. Claimant began working for respondent in its maintenance department on September 22, 1999. His job with respondent required a substantial amount of squatting, which claimant testified put strain on his left knee.

Claimant first sought treatment for his knee with Timothy W. Borchers, M.D., on March 27, 2000. At that time, he described pain in his left knee as existing for over one month. However, there is no mention of any work connection to claimant's ongoing problems. Additionally, follow-up medical reports with Joseph E. Mumford, M.D., of Kansas Orthopedics & Sport Medicine, conflict regarding whether this injury was related to claimant's employment or not. Dr. Mumford's May 15, 2000, provisional consultation report indicates that claimant's injury is not work related, next to the question which requests which compensation carrier is to be billed. However, a MetLife claim form, signed by Dr. Mumford on May 5, 2000, does indicate that claimant's injury is work related.

A disability claim form, signed by claimant and dated March 29, 2000, indicates that claimant has left knee pain and that he hit his knee at home. A Disability Claim Telephone Reporting Guide form, completed by respondent's employees, indicates that claimant struck his knee at home. Claimant objected to this form, indicating that, in some way, it has been altered. There is writing in a parenthesis which states "not work related" which appears to be in different ink than that originally used to complete the form. However, directly below that writing is a question which asks whether the injury was work related. That question was answered "no" in what appears to be the same ink as was originally used to complete the form.

Claimant argues in his brief that he advised respondent in a telephone conversation on March 28, 2000, that he had injured his knee and needed medical treatment. Claimant goes on to argue that he advised respondent that this injury was possibly work related. However, claimant's testimony at the preliminary hearing, pages 17 and 18, verifies that claimant did not report this as work related because, at that time, he was not sure.

Finally, respondent's nurse, Joyce Ann Illingworth, acknowledges talking to claimant on or about March 28, 2000. During that conversation, she asked whether the injury was work related and claimant told her that he had struck his knee on a cabinet at home. This conversation verified claimant's earlier voice mail to respondent, when he advised respondent that he had struck his knee on a cabinet and suffered an injury.

Respondent argues that claimant did not allege to respondent that he had suffered a work-related injury until May 19, 2000, when he contacted respondent, requesting an accident report be prepared. That accident report was prepared by Ms. Illingworth and, according to her testimony, was the first time claimant alleged that the injury to his left knee was work related.

The Administrative Law Judge found that claimant proved accidental injury and that claimant's accidental injury arose out of and in the course of his employment. However, the Order went on to deny claimant benefits after the Administrative Law Judge found claimant had not proven notice within 10 days or just cause for having failed to provide such notice.

In workers' compensation litigation, it claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence. K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g). The Appeals Board finds claimant has failed in his burden of proving that he provided timely notice to respondent of an accidental injury or that there was just cause for this failure to provide notice in a timely fashion.

The Appeals Board affirms the Administrative Law Judge's finding that claimant suffered an accidental injury. Claimant's testimony that he injured his knee is uncontradicted. However, the Appeals Board finds claimant has not proven that his accidental injury arose out of and in the course of his employment with respondent. There is conflicting evidence, both medically and in the testimony, that claimant, while he suffered an injury, may have injured himself at home after striking his knee on a cabinet. The Appeals Board finds that evidence more persuasive in finding that claimant has not proven that the accidental injury suffered through March 30, 2000, arose out of and in the course of his employment with respondent.

The Appeals Board, therefore, finds that claimant should be denied benefits for the alleged accidental injury through March 30, 2000, to his left knee, having failed to prove that his accidental injury arose out of and in the course of his employment, that he provided timely notice and that there was just cause for his failing to provide timely notice.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated June 28, 2000, denying claimant benefits for an accidental injury through March 30, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Clifford K. Stubbs, Lenexa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director